83-1243

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No._____

TOM FRANKLIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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CONSTITUTIONAL PROVISIONS

United States Constitution:

Fifth Amendment 3,5

Sixth Amendment 3,5

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Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above case on October 7, 1983.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Georgia.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on October 7, 1983. A timely petition for rehearing en banc was denied on November 22, 1983. Copy of said deniel is seth forth in the Appendix hereto. The Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether defendant was denied the right to counsel during an interrogation by an F.B.I. agent, that took place behind closed and locked doors after de-

fendant had taken a polygraph examination at F.B.I. headquarters, when defendant's attorney was prohibited from being present and did not know that the defendant was being interrogated after the polygraph examination.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the fifth and sixth amendments to the United States Constitution.

STATEMENT OF THE CASE

Tom Franklin was indicted on July 22, 1982 in a two-count indictment with conspiring to, and to receive, conceal, barter, sell and dispose of ladies wearing apparel of a value in excess of Five Thousand Dollars ($5,000.00), which was moving as and which constituted interstate commerce, in violation of Title 23, U.S.C., Section 2315 and Title 18, U.S.C., Sections 2315 and 2.

Defendant Franklin, through his attorney, agreed with the assistant U.S. Attorney that he would take a polygraph examination on the condition that if he passed, that the indictment would be dismissed.

Defendant Franklin and his attorney went to the F.B.I. office for the examination. Franklin's attorney requested to be present during the examination, but was refused. Franklin and his attorney then signed waivers and Franklin was taken by himself behind closed and locked doors and the polygraph examination was administered by the F.B.I. agent. The F.B.I. agent conducted a pre-test interview, as agreed upon, gave the test and then, after the test indicated deception on the part of the defendant, proceeded to interrogate defendant without his attorney present and

without advising defendant of his right to counsel or to remain silent. During this interrogation, the F.B.I. agent elicited an incriminating statement from defendant which was used against him at trial, over objection.

REASONS FOR GRANTING THE WRIT

I. The incriminating statement was taken from the defendant in violation of his sixth amendment right to counsel.

II. The incriminating statement was taken from the defendant in violation of his fifth amendment right against self incrimination.

I. "An accused requires the guiding hand of counsel at every step in the proceedings against him." Phillips v. Smith, 300 F. Supp. 130 (S.D. Ga. 1969)

"In addition to counsels presence at trial, accused is guaranteed that he not stand along against state at any stage of prosecution, formal or informal,

in court or out, where counsel's absence might derogate accused's right to fair trial." U.S. v. Wade, 87 S.Ct. 1926, 388 U.S. 218, 18 L.Ed 2d 1149.

"An accused's right to counsel at every step of proceedings extends only to requirement of counsel at every step where an accused who is without counsel may be prejudiced." U.S. v. Murphy, C.A. Mich. 1969, 413 F. 2d 1129, Certiorari denied 90 S.Ct. 195, 396 U.S. 896, 24 L.Ed 2d 174.

After the polygraph examination showed deception by Franklin, the complexion of the case changed, his attorney was not aware of the results and because he was outside locked doors could not give advice to his client. The agent proceeded to interrogate Franklin without his attorney present and elicited the incriminating statement. This prejudiced defendant.

II. "Incriminating statements made by a defendant, after he has been indicted and retained counsel, are inadmissable as having been obtained in violation of his right to counsel, if such statements are made to an individual acting as an agent of law enforcement officials and prime object of such agent is to elicit incriminating statements by defendant." People v. Brooks, 1980, 425 N.Y.S. 2d 951, 103 Mise 2d 294, reversed on other grounds, 444 N.Y.S. 2d 615, 83 A.D. 2d 349.

The sole purpose of the post test interrogation by the F.B.I. agent was to elicit incriminating statements from defendant Franklin.

The trial court erroneously admitted the incriminating statement elicited in violation of defendant's fifth and sixth amendment rights and

therefore, petitioner's conviction must be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit United States Court of Appeals.

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for Petitioner

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CERTIFICATE OF SERVICE

I, JOHN W. GREER III, hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari on Hon. Janice Gordon, Assistant United States Attorney for the Northern District of Georgia, 75 Spring Street, N. W., The Richard B. Russell Building, Atlanta, Georgia 30303, by placing same in the U. S. Mail, properly addressed with adequate postage affixed.

This 17th day of January, 1984.

JOHN W GREER III

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Eleventh Circuit

No. 82-8751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOM FRANKLIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(October 7, 1983)

Before JOHNSON and HENDERSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

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*The Honorable Clarence W.Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Tom Franklin appeals his convictions of receiving, selling and disposing of stolen merchandise in violation of 18 U.S.C.A. Sec.2315 and of conspiracy to receive, sell and dispose of merchandise in violation of 18 U.S.C.A. Sec.371. On this appeal he contends that the trial court erred (1) in admitting certain statements he made prior to receiving Miranda warnings, (2) in admitting statements he made to a polygraph examiner in a pre-test interview, and (3) in instructing the jury that his refusal to testify could not raise any presumptions against him. Because we find his contentions to be without merit, we affirm the judgment of the district court.

On June 22, 1982, FBI agent James Procopio, accompanied by another FBI agent, went to Franklin's place of business to question him about the theft of a shipment of ladies' wearing apparel.

At the time of this interview, two of Franklin's associates had implicated him in the scheme. One of these associates had already pleaded guilty to his involvement, while the other had been granted immunity by the government in exchange for testimony against the other participants in the theft and disposition of the property.

Upon arriving at Franklin's business, a grocery store, the agents told him that they had received information regarding his possible participation in the theft, and asked him whether he would be willing to answer questions about the matter. Franklin said that he would. At Franklin's request, the three men then went to a small cubicle in the back of the store which served as his office in order to insure their privacy.

According to Agent Procopio, Franklin was asked whether he had knowledge of

the theft. Franklin initially answered that Neal had told him that he "was involved in a case with some stolen clothing," Rec. Vol. 3 at 119. In response to more specific questioning, Franklin denied any knowledge or involvement in either the theft or the disposition of the clothing.

At no time during the questioning by the FBI agents was Franklin advised of his Miranda rights. See Miranda v. Arizona, 384 U.S. 436 (1966). Nonetheless, Agent Procopio testified at the trial as to the statements made by Franklin. Franklin's first contention on appeal is that he should have been advised of his Miranda rights since the questioning constituted a custodial interrogation, and that the failure to do so mandated the exclusion of his statements at trial.

We reject this agrument. Franklin was not subjected to custodial interrogation within the meaning of Miranda and subsequent decisions dealing with the constitutional rights of those subject to police examination.

In Miranda, the Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. The Court stated that a suspect subject to such custodial interrogation must be advised of certain fifth and sixth amendment rights prior to being questioned. Id. at 477-78.

The former Fifth Circuit Court of Appeals and now this court have traditionally looked to four factors to determine if there was a custodial interrogation warranting Miranda warnings:

(1) whether there was probable cause to arrest; (2) the subjective intent of the law enforcement officers; (3) the subjective belief of the Defendant as to whether his freedom was significantly restricted; and (4) whether the investigation had focused on the Defendant at the time of interrogation. See, e.g., United States v. Lueck, 678 F.2d 895, 900-02 (11th Cir. 1982); United States v. Henry, 604 F.2d 908, 915-16 (5th Cir. 1979); United States v. Warren, 578 F.2d 1058, 1070-72 (5th Cir. 1978) (en banc), rev'd in part on other grounds, 612 F.2d 887 (5th Cir.) (en banc), cert. denied, 446 U.S. 956 (1980); Brown v. Beto, 468 F.2d 1284, 1286 (5th Cir. 1972).[1]

[1]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

No single element is determinative of a Miranda violation; neither must all of the elements be present. Lueck, 678 F.2d 895, 900. Rather, evaluation of the impact of each of these factors must be considered on a case-by-case basis. Id.[2]

Our examination of the evidence at Franklin's trial weighs against a finding of a custodial interrogation. Although it is apparent that at the time of the questioning there was probable cause to believe that Franklin was involved in the crime and that, in fact, he had become at least one "focus" of the investigation,

[2]We are mindful that the test used in this circuit predates the decisions of the Supreme Court in Beckwith v. United States, 425 U.S. 341 (1976), and Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam), in which the Court relied exclusively on the apparent freedom of the subjects of interrogations in ascertaining if the defendants should have been advised of their Miranda rights. We note that the Court's concentration on this element casts some doubt on two of the considerations found in the opinions of the Fifth Circuit Court of Appeals --

it is equally clear that neither the officers nor Franklin believed that he was in custody or that he was under any restraint at that time. Franklin testified that he freely consented to the questioning, that he suggested the use of his office, and that he felt that he could have ended the questioning at any time. Moreover, Agent Procopio stated that he and the other agent did not intend to place Franklin under arrest at the time of their visit to his store, and that the idea of an arrest did not occur to them at any time during the

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probable cause to arrest, and the focus of the investigation -- but we decline to decide the ultimate propriety of those factors here, inasmuch as the agents' failure to give Miranda warnings to Franklin may be justified under either the Fifth Circuit test or the more narrow Beckwith analysis.

questioning.[3] The subjective beliefs of both Franklin and the agents, coupled with the fact that the interrogation was conducted in a neutral and coercion-free setting, lead us to conclude that Franklin was not subjected to custodial interrogation within the meaning of Miranda.[4]

Franklin next complains of the trial court's admission into evidence of statements he made to a polygraph examiner during the pre-test stage of an examination. Franklin claims that the statements were induced with the promise of a benefit to him and, therefore, that

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[3]Franklin was not arrested until several weeks after the initial meeting.

[4]This in no way implies that interrogation in a neutral setting may by itself be dispositive of the issue. See Orozco v. Texas, 394 U.S. 324, 326-27 (1967) (warnings required even though interrogation took place in suspect's home).

they should have been excluded as a product of an involuntary waiver of his fifth amendment rights. He also argues that his sixth amendment right to counsel was violated by the questioning because it took place outside of the presence of his attorney.

During a hearing on this issue in the trial court, there was evidence of an understanding, short of an actual agreement, that should Franklin pass the examination the charges against him would be dismissed. It is evident that Franklin was not promised any reward in exchange for his agreement merely to submit to the examination; instead, it was anticipated that a benefit would accrue to him only if his statements withstood the scrutiny of the polygraph. Thus, the statements were given freely and voluntarily, and were not induced by

an absolute sense of a benefit.

The record also makes it clear that Franklin freely and fully consented to being questioned outside of the presence of his attorney. Prior to the examination, the examiner met with Franklin and his attorney and verbally advised them that Franklin had the right to remain silent and that anything he said could be used against him in court. The examiner also advised Franklin that he could discontinue the questioning at any time, and that he could consult with his attorney. It is significant that even after the examiner refused a request of Franklin's attorney to be present during the interview and examination, the attorney and Franklin permitted the interview to take place. Furthermore, both Franklin and his attorney signed two written forms

acknowledging the waiver of Franklin's Miranda rights for purposes of the examination. We therefore hold that Franklin made a knowing and voluntary waiver of his fifth and sixth amendment rights.

Franklin finally urges that it was error for the district court to instruct the jury that the failure of Franklin to take the witness stand did not "raise any presumptions against him." We have examined the complete charge of the court and find it to be a permissible cautionary instruction which creates no adverse inferences with respect to the defendant's choice not to testify. This contention is also without merit. See Lakeside v. Oregon, 435 U.S. 333, 335, 339-41 (1978).

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
For The Eleventh Circuit

No. 82-3751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOM FRANKLIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (opinion _____, 11 Cir., 198_, _____F.2d_____).

( )

Before JOHNSON and HENDERSON, Circuit Judges, and ALLGOOD*, District Judge

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a pool on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

*The Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX C

CONSTITUTIONAL PROVISIONS

1. The pertinent provisions of the fifth amendment are: "... nor shall he be compelled in any criminal case to be a witness against himself ..."

2. The pertinent provisions of the sixth amendment are: "... and to have the assistance of counsel for his defense."